Supreme Court of the United States

October Term, 1940

No. 294

STEPHEN WESTOVER, Trustee in Bankruptcy of Grand Avenue Lumber Company, a corporation, Bankrupt,

Petitioner,

(Appellee Below)

vs.

VALLEY NATIONAL BANK, a banking corporation,

Respondent,

(Appellant Below)

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN L. GUST,
FRED W. ROSENFELD,
W. L. BARNUM
Professional Bldg., Phoenix, Arizona.
Attorneys for Respondent

REPUBLIC AND GAZETTE COMMERCIAL PRINTERY, PHOENIX, ARIZONA

Supreme Court of the United States

October Term, 1940

No. 294

STEPHEN WESTOVER, Trustee in Bankruptcy of Grand Avenue Lumber Company, a corporation, Bankrupt,

Petitioner,

(Appellee Below)

vs.

VALLEY NATIONAL BANK, a banking corporation,

Respondent,

(Appellant Below)

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN L. GUST,
FRED W. ROSENFELD,
W. L. BARNUM
Professional Bldg., Phoenix, Arizona.
Attorneys for Respondent

REPUBLIC AND GAZETTE COMMERCIAL PRINTERY, PHOENIX, ARIZONA

SUBJECT—INDEX

TABLE OF CASES CITED

None

OPINIONS DELIVERED

Trial Court wrote no opinion.

The opinion of the Circuit Court of Appeals is officially reported in 112 Fed. (2d) 61, and is printed in the Transcript of Record pages 338-344.

JURISDICTION OF SUPREME COURT

It is admitted that this Court has jurisdiction of this case on certiorari.

It is submitted, however, that no ground for review is presented under Subdivision 5 of Rule 38 of this court.

STATEMENT OF CASE

This is an ordinary case by a Trustee in Bankruptcy to recover two payments of money to a bank by the alleged bankrupt within four months of the adjudication in bankruptcy. It presents no novel proposition of law or fact.

Jury was waived by stipulation.

The trial court found in favor of plaintiff making the usual findings of fact and entering judgment for two payments of $3,040.00 and $3,532.99, respectively.

The defendant, Respondent here, took an appeal questioning, among other things, (1) the finding of insolvency at the date of the payment and (2) the finding that defendant had reason to believe that preference would be effected by the payments.

The Circuit Court of Appeals reversed the case upon the ground that there was no evidence to support the second of the two above mentioned findings. The evidence showed that the agent of the Bank who had charge of dealings of the bankrupt was deceased.

Petitioner, plaintiff below, marshalled certain circumstances in an attempt to create a suspicion that the Bank knowingly received the payments as preferences.

The Circuit Court of Appeals fully reviewed the evidence and held that such inference was not warranted by the evidence and reversed the case.

ARGUMENT

Petitioner sets up four grounds in support of his contention that this court should exercise its discretion in favor of a review by certiorari. These four grounds are set forth on pages 31-33 of the petition. Each and every one of these grounds depends upon the assertion and assumption therein that the Circuit Court of Appeals did something which it did not, in fact, do. A perusal of the opinion on pages 338-344 of the Transcript of Record is a sufficient answer to each and every one of these alleged grounds for review.

In his brief attached to the petition, Petitioner makes three specifications of error. (Petitioner's Brief, pages 2-3). The first and second of these specifications are based upon the proposition that the Circuit Court of Appeals decided the case upon the assumption that the Trustee in Bankruptcy to establish a prefer-

ence, must show that the alleged preferential trustee had knowledge of the intent to prefer by the bankrupt, instead of merely being required to show that such transferee had reasonable cause to believe that the transfers would effect a preference in its favor.

Reference to the opinion shows that the learned Court did nothing of the kind. On pages 338-339 of the Transcript of Record, the opinion states "the appellant challenges, among other things, the finding of fact of the trial court that it had reasonable cause to believe that the payments made to it would effect a preference. We think the evidence is entirely insufficient to support this finding," and on page 343 of the Transcript, the opinion, after considering in detail the circumstances that were relied on by the appellant to support the finding above mentioned, the Court states:

> "There is no indication in this circumstance which would reasonably require an inference of insolvency," and

further on page 343 of the Transcript of Record the Court states:

> "The explanation given by the Bank that it refused to make the loan because it was too large for the capitalization of the bankrupt is obviously well founded and involved no conclusion of insolvency," and

on the top of page 344 of the Transcript of Record, the opinion states:

> "We conclude that there is no evidence to justify the finding of the trial court that the appellant knew, or should have known, that the payment was preferential."

Thus far the Court's language is clear to the effect that it had in mind the correct Rule prescribed by the statute. After having thus decided the case, the Court states that there are other assignments which it does not find it necessary to consider because of the disposal of the case that it has made, but in making this statement the Court uses the language:

> "We are satisfied that the judgment must be reversed and judgment awarded the appellant upon the ground that the trustee has failed to establish knowledge, actual or constructive, of the bank that the payments made to it were intended as a preference."

Petitioner seizes upon this last language to support his assertion that the Circuit Court of Appeals proceeded upon an incorrect theory of the law.

If there is any inaptness in this incidental statement of the Court, it was caused by Petitioner himself. In his complaint he alleged:

> "The defendant, Valley National Bank, a Banking Corporation, had reasonable cause to believe and did believe, that at the time each of said transfers was made by said bankrupt, it was insolvent and that said transfers would effect a preference in its favor."

Transcript of Record, page 5.

It appears from said quotation that Petitioner did not content himself with alleging that the Bank had reasonable cause to believe, but went further and asserted that the Bank did believe—the equivalent of an assertion that it had actual knowledge.

Petitioner sought to insinuate throughout his brief in the Circuit Court of Appeals, as he now insinuates under the heading of "Statement of Matters Involved", pages 4 to 29 in the petition, that the Bank conspired with the bankrupt to receive these payments as a preference and in view of his attitude in that regard it is not strange that the Court stated that the evidence did not sustain that contention.

Petitioner's third specification of error is to the effect that the Circuit Court of Appeals substituted its judgment for the judgment of the trial court in reviewing and setting aside the finding of fact in question.

The Rule to be followed in reviewing such findings is set forth in Rule 52, of the Federal Rules of Civil Procedure (see page 23 Petitioner's Brief). That Rule in part reads as follows:

> "Findings of Facts shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses," and

Rule 52 (b)

> "When Findings of Facts are made in actions tried by the Court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the District Court an objection to such findings or has made a motion to amend or a motion for judgment."

The Circuit Court of Appeals in performing its duty under this Rule reviewed the evidence and reached the following conclusion:

> "We conclude that there is no evidence to justify the finding of the trial court that the appellant knew or should have known, that the payment was preferential."
>
> Transcript, page 344.

Petitioner by a lengthy statement in his petition, pages 4-29, asserts that the Circuit Court of Appeals did not properly perform this function. Most of his statements do not comply with the Rule of this court requiring the petitioner to point to the page of the record in support of his statements. It does not seem possible that this Court is in a position to accept the invitation to minutely search the record in the numerous cases that come before it on certiorari to ascertain whether the Circuit Court missed a detail here and there in reviewing the evidence. In this case the Circuit Court of Appeals, after reviewing the evidence, found that no inferences could be drawn from the facts to support the trial court's finding.

Rule 52 (a) does not require the appellate court to assume that the trial court is more expert at drawing inferences than the appellate court, nor can this court assume that counsel for Petitioner will state the case more accurately than the Circuit Court of Appeals.

The Petitioner by asking this Court to review the evidence to determine whether the Circuit Court of Appeals correctly grasped every item thereof in this case, is, in effect, proposing to abolish the Circuit Court of Appeals and impose upon this court the burden of reviewing all cases decided by the District Courts. Furthermore, if this court should undertake the task to review the evidence in detail it could only come to the conclusion that Petitioner is actuated by great hostility towards banks and presumes the Respondent guilty without evidence.

Respectfully submitted,

JOHN L. GUST,
FRED W. ROSENFELD,
W. L. BARNUM
Professional Building,
Phoenix, Arizona.
Attorneys for Respondent